87-1425

IN THE

Supreme Court of the United States

OCTOBER, 1988

NO.

LARRY E. BAY,

Petitioner

versus

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

I

Did the United States violate Larry Bay's Fifth and Sixth Amendment rights through the surreptitious interrogation conducted by a cooperating Government witness after the United States had actual knowledge that the accused had asserted his Fifth and Sixth Amendment rights and where the representatives of the United States Attorney's Office directly participated in the explicit subterfuge by telling Bay that if he did not cooperate with their investigation, they would find a way to indict him?

II

The Third Circuit's requirement that a Defendant who wishes to claim entrapment must first admit that he committed the offense violates Larry Bay's Fifth Amendment rights by compelling him to incriminate himself before he can assert that the Government induced him to commit the offense.

III

Did the trial court permit the constructive amendment of the indictment by submitting to the jury special findings as to Count III thereby adding a fourth charge?

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TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Larry E. Bay, the Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above-styled case on December 30, 1987.

QUESTIONS PRESENTED

I

Did the United States violate Larry Bay's Fifth and Sixth Amendment rights through the surreptitious interrogation conducted by a cooperating Government witness after the United States had actual knowledge that the accused had asserted his Fifth and Sixth Amendment rights and where the representatives of the United States Attorney's Office directly participated in the explicit subterfuge by telling Bay that if he did not cooperate with their investigation, they would find a way to indict him?

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OPINION BELOW

The opinion of the United States Court of Appeals for the Third Circuit is printed in Appendix A hereto, *infra*. The judgment of the United States Court of Appeals for the Third Circuit is printed in Appendix A hereto, *infra*. The Third Circuit's order staying the issuance of the mandate is printed in Appendix A hereto, *infra*.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit (Appendix A, *infra*) was entered on December 30, 1987. The jurisdiction of the Supreme Court is invoked under Rule 17.1(a)(c), Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

I.

Constitution of the United States, Amendment V

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, ... No person shall ... be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law ..."

II.

Constitution of the United States, Amendment VI

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury ... and to have the Assistance of Counsel for his defence."

STATEMENT OF THE CASE

From March, 1986, up to and including the date of Bay's indictment, a Federal Grand Jury for the Eastern District of Pennsylvania had been conducting an investigation into alleged fraud and corruption in connection with the Military Clothing Procurement Activities of the Philadelphia Defense Personnel Support Center. Pursuant to that investigation, FBI Agents, on April 14, 1986, contacted Larry Bay and advised him of their identity, the nature of the investigation, and his *Miranda* rights. Larry Bay refused to answer questions and advised the agents that he was represented by the law offices of Dykema, Gossett, Spencer, Goodnow & Trigg of Washington, D.C.

On October 24, 1986, Larry Bay was served with a subpoena to appear on November 4, 1986, before the Federal Grand Jury sitting in Philadelphia. Bay's appearance before the Grand Jury was a part of the ongoing investigation into the Defense Personnel Support Center. Prior to his actual appearance before the Grand Jury, the defendant, together with his lawyer, Howard E. O'Leary, met with representatives of the United States Attorney's Office. At the meeting, Mr. O'Leary advised the United States that his client intended to exercise his right under the Fifth Amendment. Bay's uncontradicted testimony at the suppression hearing and at trial indicated that he was told, during the meeting: "Either become a witness or we'll find a way to indict you."

On November 4, 1986, Larry Bay was called before the Grand Jury commencing at 10:23 a.m. His testimony concluded at 10:27 a.m. First Assistant United States Attorney Peter Smith advised Bay that he was not a "target" of the investigation, but was considered a "subject" of the investigation as a result of his association and employment with Gulf Apparel. Thereafter, AUSA Smith read Bay his "rights." Bay advised the AUSA and the Grand Jury that he was represented by counsel and that counsel was outside the Grand Jury room. On advice of counsel, Bay refused to answer on Fifth Amendment grounds.

On October 6, 1986, Emanuel Landau agreed to become a cooperating Government witness in furtherance of the overall investigation of fraud and corruption at the Defense Personnel Support Center. On

November 17, 1986, Emanuel Landau and H. Landau & Company entered into a guilty plea memorandum. In Exhibit "A" to the plea memorandum, Landau agreed to cooperate in the Government's investigation in return for the Government's promise to bring to the attention of the sentencing judge Landau's cooperation together with certain other civil fraud concessions. Larry Bay had no knowledge of Landau's decision to plead guilty and to become a cooperating Government informant.

On December 18, 1986, B.G. Colton, an employee of H. Landau & Company, was interviewed in his lawyer's office by Agent Thomas G. Bonnar of the Department of Defense, Inspector General's Office, and FBI Agent Maurice Welch. That interview was conducted pursuant to the terms of a proffer agreement between Colton and the United States Attorney's Office for the Eastern District of Pennsylvania. During the course of the interview, Colton told the agents that Larry Bay had called him and asked him to offer T.H. Kang a sum of money to withdraw his bid on a Government trouser contract. Special Agent Ford of the FBI candidly admitted that based upon B.G. Colton's interview, he had reason to believe that a crime had been committed and Bay was involved.

Acting on information gleaned from the B.G. Colton interview, a Grand Jury subpoena was issued on January 5, 1987, to Coastal Industries of Selma, Alabama, requesting *inter alia*, checks, purchase and accounts payable records for H. Landau & Company and B.G. Mills, Inc. The response date on the subpoena was January 20, 1987. On January 6, 1987, FBI Agents served the subpoena upon Sidna Utsey, an officer of Coastal Industries. Mrs. Utsey advised Larry Bay of the documents requested in the subpoena.

On or about January 7, 1987, Larry Bay's wife contacted Emanuel Landau and requested that he call her husband in an hour. Within minutes, Landau called his attorney and Special Agent Joe Ford of the FBI. Landau advised Agent Ford that he had been contacted by Bonnie Bay and that she had requested him to contact her husband later at home. The investigating agent advised Landau that Bay's call was most likely prompted as a result of the subpoena which had been served on Coastal Industries of Selma, Alabama, and which involved an alleged

bid-rigging scheme between Larry Bay and an employee of Landau's, B.G. Colton. Special Agent Ford instructed Landau to tape record his conversation with Larry Bay. The Government concedes that all of the tape recordings, i.e., January 7, 8, and 19, 1987, were made at the express suggestion and request of the FBI.

During the January 7, 1987, call, Bay told Landau that Coastal had received a subpoena the previous day, which included a request for invoices from H. Landau & Company and B.G. Mills. Bay told Landau that the one transaction for which Coastal possessed records involved B.G. Mills rather than H. Landau & Company. Landau was not familiar with the transaction. Bay asserted that the purpose of his call was to advise Landau that a portion of the Government's investigation was focusing on his company and employee, B.G. Colton.

The January 7, 1987, telephone call, initiated by Larry Bay, was the factual basis for the Government's Count I of the indictment which alleged a violation of obstruction of justice, i.e., Title 18, U.S.C. § 1503. The jury acquitted Bay of the January 7, 1987, (Count I) charge. Bay was convicted of Counts II and III (obstruction of justice) arising out of the January 8 and 19 telephone conversations initiated by Landau at the request of the Government.

On January 8, 1987, Landau met with FBI Agents and two Assistant United States Attorneys. Landau turned over to them his January 7th taped conversation. The tape was played back in everyone's presence. The Government agents outlined what Landau was to do during the call he was to make January 8, 1987. The purpose of Landau's upcoming call was to obtain incriminating evidence. Landau's January 8 call to Larry Bay was made from a telephone booth outside the FBI office. FBI Agents attached a recording device to the telephone. Landau candidly admitted that the recording of the January 8 conversation was always in the Government's possession when he stated, "I never had it." At the time of these conversations, Larry Bay did not know that Landau was an informant.

FBI Agent Joe Ford admitted on cross-examination that he had used Landau for the sole purpose of obtaining incriminating statements.

He further confirmed that he told Landau, "what to do and how he was to do it." At the time Landau was making the consentual tape recordings, the Government Agents had actual knowledge that Bay had previously invoked his Fifth Amendment right and had earlier requested the presence of counsel during any interview.

On January 15, 1987, the materials requested by the Grand Jury subpoena issued to Coastal Industries were Federal Expressed to Agent Joe Ford. The materials consisted of a CBD bill dated January 15, 1986, a check from Coastal Industries to B.G. Mills in the amount of Twenty Two Thousand Twenty-Six Dollars and Forty Cents ($22,026.40) dated January 17, 1986, and an accounts payable voucher from Coastal based upon the B.G. Mills invoice. The Coastal documents were received by the FBI on January 16, 1987, four days *before* the scheduled appearance by Coastal's custodian before the Grand Jury. On the same day the Government received the Coastal documents, Agent Ford called Landau asked him to make another telephone call to Larry Bay on January 19, 1987. On the morning of January 19, the FBI called Landau and briefed him on certain facts which the FBI wanted explored. At the direction of the Federal Agents, Landau called Bay; he admitted that his purpose was to "pump Bay for information." The January 19 call was made from Landau's home; no FBI Agents were present.

On May 7, 1987, the District Court conducted a hearing on the defendant's motion to suppress the tape recordings. On May 11, 1987, the District Court denied the defendant's motion, and permitted the Government to introduce the tape recordings as evidence at trial.

Prior to trial, the defendant submitted proposed charge number 9 to the trial judge. Bay's requested charge number 9 asserted that Bay was a victim of entrapment as to the offenses charged in the indictment. The language of the requested charge was drawn from *Devitt & Blackmar*, § 13.09. On the morning of trial, the Government objected. The defendant advised the Court that Bay intended to assert his plea of not guilty, and more specifically, that the January 8 and 19 calls were the product of the Government's conduct in attempting to get Bay to make incriminating statements in an underlying bribery case. The District Court told the defendant:

> ... If you assert the defense of entrapment then the defendant is required to admit -- to concede that for the purposes of the case the Government has proved each essential element of the offense with which the defendant is charged.

The defendant, through counsel, responded:

> We cannot do that then Your Honor because his intent obviously was not to influence or to impede the activities of the Court and/or the Grand Jury.

The Court then advised:

> You're not going to assert the defense of entrapment.

The defense counsel brought to the Court's attention that there was a split among the Circuits on the question, but Judge O'Neill indicated that he had no other choice but to follow the Third Circuit. There was no question that Bay participated in each of the telephone calls, thus, he admitted doing all the acts that constituted the offense, but denied having the *mens rea* necessary to convert otherwise innocent conduct into an obstruction of justice.

The case was tried before the Honorable Thomas N. O'Neill, Jr. and a jury for five days. On May 22, 1987, the jury returned a verdict of not guilty as to Count I and guilty as to Count II. As to Count III, the jury sent the Court a note which read in pertinent part:

> Judge O'Neill:
>
> Regarding Count III of the indictment, two statements are made. The first accuses the defendant of telling a representative of H. Landau that a Coastal officer would give a false explanation of the purpose of the $22,000.00 payment. It

> then accuses the defendant of requesting Colton to also give a false explanation. In order to either find the defendant guilty or not guilty, must each of these allegations be considered to be both true or both false?
>
> William L. Gordon

In response to the jury's question, the trial judge, over objection, submitted special findings to the jury without additional instructions.

The jury found Bay guilty of corruptly endeavoring, etc., to impede the due administration of justice by telling a representative of H. Landau & Company that an officer of Coastal would give a false explanation ... and found Bay not guilty as to the portion of Count III which charged the defendant with corruptly endeavoring to influence, obstruct and impede, etc., the due administration of justice by requesting Bernard G. Colton to also give a false explanation of the purpose of the payment.

The Court of Appeals for the Third Circuit, when presented with these issues, affirmed Bay's conviction on December 30, 1987. The Third Circuit, relying on its *Muzychka* opinion, rejected Bay's Fifth and Sixth Amendment arguments and held, *inter alia*, that *Miranda* had indeed displaced *Escobedo*. *Muzychka*, 725 F.2d at 1067-68.

Second, the Court of Appeals upheld the District Court's denial of the entrapment defense to Bay while recognizing that the Supreme Court had already granted *certiorari* in a case presenting the precise issue. *United States v. Mathews*, 803 F.2d 325 (7th Cir. 1986), *cert. granted*, No. 86-6109, 107 S.Ct. 1601 (1987). The sole question presented in *Mathews*, which was argued on December 2, 1987, is whether a defendant may be required to admit all the elements of a crime, including *mens rea*, before being allowed to present an entrapment defense. 56 U.S.L.W. 3034 (1987). Because the Supreme Court had granted *cert* in *Mathews*, the Third Circuit refused to reconsider its holding in *United States v. Hill*, 655 F.2d 512, 514 (3rd Cir. 1981), *cert. denied*, 457 U.S. 1106 (1982).

Finally, the Third Circuit, while acknowledging its general disapproval of the use of special verdicts in criminal cases, nevertheless refused to announce a general prohibition of special verdicts even in light of a timely objection by the defense.

On January 25, 1988, pursuant to Rule 41(b), Federal Rules of Appellate Procedure, the Third Circuit stayed issuance of its mandate in order to allow Bay to file this Petition for Writ of Certiorari to the Supreme Court of the United States.

REASONS FOR GRANTING WRIT

Larry E. Bay asserts that the United States violated his Fifth and Sixth Amendment rights by employing surreptitious interrogation conducted by Manny Landau, a cooperating witness, after the United States had actual knowledge that Larry Bay had asserted his Fifth Amendment right to remain silent and was represented by counsel. In this case, the Government's direct intervention, through its Assistant United States Attorneys as well as FBI Agents, was the type of deliberate ploy designed to sever and interfere with the attorney-client relationship where the representatives of the United States Attorney's Office directly participated in the explicit subterfuge by threatening Bay that if he did not cooperate with their investigation, they would find a way to indict him. The record presents clear evidence of an egregious violation of Bay's Sixth Amendment rights. The existence of a parallel Fifth Amendment issue combines to give the Supreme Court the opportunity to review the vast, untouched range of police conduct which constitutes a cognizable violation of the right to effective assistance of counsel. An unanswered question remains as to what "earlier stages" of the criminal process may trigger the Sixth Amendment right to counsel, in light of *Escobedo's* "focus" rationale. The Petitioner suggests that the question needs to be settled by the Supreme Court.

The Third Circuit, in *Bay*, held that the Sixth Amendment right to counsel did not attach because of the "bright line" holdings of the Court in *Moore v. Illinois*, 434 U.S. 220 (1977), and *Kirby v. Illinois*, 406 U.S. 682 (1972). [The right to counsel attaches ... at or after the

initiation of adversary judicial criminal proceedings.] Moreover, the Third Circuit rejects Bay's contention that the right to counsel attaches before an accusatory pleading where the defendant had become the focus of an investigation. In that regard, the Third Circuit, relying upon its opinion in *United States v. Muzychka*, 725 F.2d at 1067-68 (3rd Cir. 1984), *cert. denied*, 104 S.Ct. 2390 (1984), held that *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) has indeed displaced *Escobedo v. Illinois*, 378 U.S. 478 (1964).

The Eleventh Circuit, in *DeAngelo v. Wainwright*, 781 F.2d 1516 (11th Cir. 1986), *cert. denied*, 107 S.Ct. 444 (1986), strongly suggests that *Escobedo* was not an abberation. Indeed, the Third Circuit's opinion in *Bay* recognizes "some of the Courts of Appeal have resuscitated the 'focus' reasoning of *Escobedo* in recent decisions as noted in Bay's brief. They have not done so in the context of deciding to exclude evidence." *See DeAngelo v. Wainwright, supra; Flittie v. Solem*, 775 F.2d 933 (8th Cir. 1986), *cert. denied*, 106 S.Ct. 1223 (1986); *United States ex rel. Hall v. Lane*, 804 F.2d 79 (7th Cir. 1986), *cert. denied*, 107 S.Ct. 1382 (1987). Bay respectfully suggests that the Third Circuit misreads these opinions.

The Third Circuit's attempt, in *Bay*, to limit the Sixth Amendment right to counsel to the "initiation of adversary judicial criminal proceedings" is misplaced in light of the clear language contained in the Supreme Court's decision in *Maine v. Moulton*, 474 U.S. 159, 106 S.Ct. 477, 88 L.Ed.2d 481 (1985).

Although a "bright line test" for the application of the Sixth Amendment may be desirable, it necessarily overlooks the vast range of police conduct which can effectively dilute a citizen's right to effective assistance of counsel.

The right to the assistance of counsel guaranteed by the Sixth Amendment is indispensible to the fair administration of our adversarial system of criminal justice. *Gideon v. Wainwright*, 372 U.S. 335 (1963). Justice Sutherland, in *Powell v. Alabama*, 287 U.S. 45 (1932), commented that the defendant requires the guiding hand of counsel at every stage of the proceedings against him.

The Supreme Court of the United States, in *Maine v. Moulton, supra*, recognized, "that the assistance of counsel cannot be limited to participation in a trial; to deprive a person of counsel during the period prior to trial may be more damaging than the denial of counsel during the trial itself." Continuing, Justice Brennan critically focused the issue as follows:

> ... Recognizing that the *right to the assistance of counsel is shaped by the need for the assistance of counsel*, we have found that the right attaches at *earlier, critical stages in the criminal justice process where the results might well settle the accused's fate and reduce the trial itself to a mere formality. See United States v. Wade*, 388 U.S. 218, 224 (1967). (Emphasis ours).

In this case, the United States had the necessary evidence with which to indict Larry Bay for a violation of federal law at the conclusion of its interview with B.G. Colton, i.e., December 18, 1986. The United States delayed in seeking an indictment for the express purpose of obtaining additional evidence about the Colton-T.H. Apparel transaction, an investigation completely separate from the focus of the investigation against Selma Apparel. In short, the Government's purpose in the delay was to gain "a tactical advantage" at the expense of the accused. In the process, the Government gained additional evidence of a separate federal violation as well as to make good its threat, "become a Government witness or we'll find a way to indict you."

The consentual recordings initiated by Landau on January 8 and 19, were the type of ploy that properly should be treated as the functional equivalent of interrogation within the meaning of *Rhode Island v. Innis*, 446 U.S. 291 (1980). The Third Circuit, at page 11 of its opinion, concedes, "... Bay is correct in characterizing the conversations as interrogations within the meaning of *Rhode Island v. Innis*. His claim is completely meritless because he was not in police custody at the time of the conversations."

In reaching its holding, the Court of Appeals for the Third Circuit

does not even attempt to answer the Supreme Court's teaching in *Maine v. Moulton, supra*, as follows:

> However, knowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to the assistance of counsel as is the intentional creation of such an opportunity. Accordingly, the Sixth Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel's presence in a confrontation between the accused and a State agent.

The opinion of the Supreme Court, in *Escobedo v. Illinois, supra*, written by Justice Goldberg, represents perhaps the high water mark of the Supreme Court's efforts to control police methods of interrogation through the Sixth Amendment. Justice Goldberg noted that the interrogation, in *Escobedo*, took place before the defendant was indicted. The Justice focused the issue as follows:

> ... But in the context of this case, that fact should make no difference. When petitioner requested and was denied an opportunity to consult with his lawyer the investigation had ceased to become a general investigation of an unsolved crime. *Spano v. New York*, 360 U.S. 315, 327, 79 S.Ct. 1202, 1209, 3 L.Ed.2d 1265 (1959). The petitioner had become the accused and the purpose of the interrogation was to 'get him' to confess his guilt despite his constitutional right not to do so.

Based upon B.G. Colton's interview on December 18, 1986, by Agents Thomas G. Bonnar and Maurice Welch, the Government had reason to believe that a crime had been committed and that Bay was involved, i.e., probable cause. Twenty days later, Agent Joe Ford

directed Landau to contact Bay on January 8 and 19, 1987; the ultimate purpose was to elicit a confession from Larry Bay. At the time of Landau's call, the Bay investigation had already reached a "critical stage" thereby triggering Bay's Sixth Amendment right to counsel. In *Massiah v. United States*, 377 U.S. 201 (1964), decided the same year as *Escobedo*, the Supreme Court established that interrogation occurs for Sixth Amendment purposes when law enforcement officers deliberately elicit incriminating statements from an accused in the absence of counsel. The Government, in this case, confessed its intent to elicit incriminating statements from Bay.

On the facts presented in *Bay*, we are not confronted with either the proverbial constable's blunder, nor overzealousness in the pursuit of otherwise legitimate law enforcement ends. Rather, we have a pattern of conduct calculated to gain incriminating evidence. The Supreme Court should not countenance or approve the conduct of the Government's representatives who plan, calculate, and orchestrate the interrogation of an accused by subterfuge. To say that what occurred here was not the equivalent of a "station house interrogation" amounts to nothing more than pure legal sophistry. It should not be upheld. To the extent that the Third Circuit believes that *Escobedo* was modified by *Miranda, sub silento* ["displaced"], we must suggest that the Third Circuit reads *Miranda* too narrowly. The term "interrogation," under *Miranda* and the Fifth Amendment, refers not only to express questioning, but includes "any words or actions on the part of the police (other than those normally attendant to arrest and custody) ... that the police should know are reasonably likely to elicit an incriminating response from a suspect, amounts to an interrogation." *See Arizona v. Mauro*, 481 U.S._____, 107 S.Ct. 1931, 95 L.Ed.2d 458 (1987); *Rhode Island v. Innis*, 64 L.Ed.2d at 308.

In this case, Landau's calls to Bay on January 8 and 19, 1987, were, in fact, the functional equivalent of interrogation under *Innis* because the Government's purpose and intent in inducing the calls was clearly calculated to elicit incriminating statements from Bay.

The Government's involvement in the case *sub judice* is far more aggressive, egregious, and calculated than the facts presented in any

other case recorded by the Supreme Court. The defendant respectfully suggests that the Government's involvement in the case *sub judice* and the threat to Bay to become a cooperating witness or face indictment also triggers the due process defense also known as "the outrageous Government conduct defense." Under this defense, the due process clause of the Federal Constitution acts as a limitation on the exercise of police power and, in particular, the exercise of undercover police activity. Indeed, even the Third Circuit recognized, in *United States v. West*, 511 F.2d 1083, 1085 (3rd Cir. 1975), that "undercover police activity must never pass the point of toleration."

If the Fifth and Sixth Amendments are vital to our form of Government, the Government's clandestine efforts in this case should not be allowed to circumvent or dilute Bay's right to remain silent and assistance of counsel which he had invoked unequivocally on two prior occasions before the Government set out to gain "incriminating evidence" at any cost. In this case, the Government made good on its promise, "either become a witness, or we'll find a way to indict you."

The Supreme Court of the United States, in *Arizona v. Mauro*, *supra*, reached "the bottom line" in this case when it stated:

> The focus in ascertaining whether particular police conduct amounts to interrogation, then is not on the form of the words used, but the intent of the police officers ...

The facts in *Bay* prove Justice Goldberg a prophet when he stated:

> Petitioner had become the accused, and the purpose of the interrogation was to 'get him' to confess his guilt despite his constitutional right not to do so.

II.

THE FIFTH AMENDMENT PROHIBITS COMPELLING A CRIMINAL DEFENDANT TO ADMIT ANY OF THE ELEMENTS OF THE OFFENSE

The Third Circuit Court of Appeals' requirement that the defense of entrapment requires admission of guilt of the crime charged and all of its elements, including the required mental state, violates that defendant's Fifth Amendment right by compelling him to incriminate himself before he can assert that the Government induced him to commit the offense. *See United States v. Hill, supra.*

The defendant asserts that there is no inconsistency in allowing a defendant to require the Government to prove that he committed the offense, while claiming that he was entrapped into doing so. Whether the defendant was predisposed to commit the offense and, therefore, was not entrapped, is a jury question. The entrapment defense should have been submitted to the *Bay* jury pursuant to the defendant's requested charge number 9, because Bay's denial of criminal intent was not inconsistent with his claim of entrapment.

Although the entrapment defense has no constitutional basis, constitutional implications are triggered when, as in this case, the District Court restricts the defense's use of the defense to those cases where the defendant admits all the elements of the crime charged, including the requisite mental intent. *United States v. Hill, supra.* To require Larry Bay to admit guilt before he may raise the entrapment defense infringes upon the defendant's constitutional right to require the Government to prove each and every element of its case beyond a reasonable doubt. *Eg. United States v. Demma,* 523 F.2d 981, 986 (9th Cir. 1975) (En banc). In short, Bay was faced with a "Hobson's Choice," i.e., in order to assert the defense of entrapment, the Third Circuit and the trial court required Bay to incriminate himself as to every element of the offense, including the requisite *mens rea.* In doing so, the Court ran headlong into the Fifth Amendment's protections.

Over the last half century, the Supreme Court has focused on the

"intent or predisposition of the defendant to commit the crime." *See Hampton v. United States*, 425 U.S. 484, 488-89 (1976); *Sherman v. United States*, 356 U.S. 369, at 372 (1958); *Sorrells v. United States*, 287 U.S. 435, at 442 (1932).

The precise issue raised by Bay herein is the subject of a grant of *certiorari* to the United States Court of Appeals for the Seventh Circuit in *United States v. Mathews, supra*. The sole question presented in *Mathews*, which was argued before the Supreme Court on December 2, 1987, is whether a defendant may be required to admit all the elements of a crime, including *mens rea*, before being allowed to present an entrapment defense. 56 U.S.L.W. 3034 (1987).

Bay respectfully suggests that the Third Circuit's present position on entrapment is contrary to the express holding of *Sorrells v. United States, supra*. The *Sorrells* majority expressly considered and rejected the Government's contention that the entrapment defense was not available to a defendant who pleads not guilty. *Id.* at 452. Thus, from *Sorrells* forward, the United States Supreme Court has permitted defendants to plead not guilty and still claim entrapment. Although the Federal Circuits are sharply divided, the weight of authority suggests that an entrapment defense is appropriate and should be submitted to the jury where an accused's denial of criminal intent is wholly consistent with his claim of entrapment.

III

CONSTRUCTIVE AMENDMENT OF THE INDICTMENT - SPECIAL FINDINGS IN A CRIMINAL CASE

Under the Fifth Amendment's provision that no person shall be held to answer for a capital crime unless first indicted by a Grand Jury, the established rule provides that once an indictment has been returned, its charges may not be broadened except by the Grand Jury itself. *Stirone v. United States*, 361 U.S. 212 (1960); *Ex parte Bain*, 121 U.S. 1 (1887). Although the language in *Bain* is broad, it has been recognized that *Bain* and *Stirone* do not prevent Federal Courts from changing an indictment

regarding matters of form or surplusage. *Russell v. United States*, 369 U.S. 749, 770 (1962).

The Third Circuit's reliance upon *United States v. Miller*, 471 U.S. 130 (1985), is misplaced. *Miller* stands for the proposition that the Fifth Amendment's Grand Jury guarantee is not violated when a defendant is tried under an indictment that alleges a certain fraudulent scheme, but is convicted based upon proof that supports only a significantly narrow and more limited, though included, fraudulent scheme.

Larry Bay contends that the Court's action in breaking the verdict form on Count III into two components (via special findings) effectively broadened the charge contained in the third count of the indictment, thereby violating *Stirone* and *Bain*. In effect, Larry Bay was actually tried upon four separate substantive violations of Title 18, U.S.C. § 1503.

The distinction between an amendment and a variance is critical because a variance is subject to the Harmless Error Rule, *Berger v. United States*, 295 U.S. 78 (1935), whereas an amendment prohibited by *Stirone* and *Bain* is prejudicial *per se*. *United States v. Bryan*, 483 F.2d 88, 96 (3rd Cir. 1973).

In short, the trial judge's effort to parse Count III constructively amended this indictment and infected the record with *per se* error under *Stirone*.

Finally, the Government cannot have it both ways. Either Bay's motion to dismiss each of the counts of the indictment on the grounds of duplicity should have been granted and the indictment dismissed, or the Government's present construction of Counts II and III effectively amends the indictment, thereby violating the Fifth Amendment's provision that no person shall be held to answer for a capital crime unless on indictment of a Grand Jury.

The petitioner contends that the trial court's use of the special verdict form gave the Government essentially two "bites at the apple." In doing so, the trial court infected the record with error and failed to

follow the well established admonitions of the Third Circuit in reviewing cases which utilize special verdict forms.

In *United States v. Desmond*, 670 F. 2d 414 (3rd Cir. 1982), the Third Circuit established the general rule that "special verdicts are generally disfavored in criminal cases, but there is no *per se* rule against them." The Third Circuit's rationale arises from the antipathy toward special verdicts in criminal cases and has its roots in the doctrine of "jury nullification." Throughout American Judicial History, there has been a recognition of the doctrine of jury nullification, that is, the power of a jury to bring a verdict "in the teeth of both law and facts, a technical right, if it can be called so to decide against the law and the facts ..." *See Horning v. District of Columbia*, 254 U.S. 135 (1920); *See also Sparf and Hansen v United States*, 156 U.S. 51 (1895).

In this case, the trial court erred in overruling Bay's objection to the submission of the special verdict form to the jury. Moreover, the trial court's failure to give additional instructions to the jury regarding its use of the special verdict forms compounded the error.

The question presented herein has not been squarely presented or answered by the Supreme Court of the United States. The petitioner contends that the special verdict form issue should be decided because it is an important and unsettled question of Federal law which needs to be decided by the Court.

Moreover, the present Federal Rules of Criminal Procedure provide for verdicts in Rule 31. There is not an explicit rule under the Rules of Criminal Procedure comparable to Rule 49 of the Federal Rules of Civil Procedure which is entitled "Special Verdicts and Interrogatories."

What is uniquely critical to the resolution of the issue arises from the trial judge's failure to give the jury any additional instructions as to the use of the special verdict forms supplied to the jury following their question.

We respectfully suggest that it is absolute unbridled speculation

on the part of the Third Circuit that "there is no reason to believe that the use of special verdicts led the jury step by step to a verdict of guilty."

It is clearly reasonable to assume that the jury was having extreme difficulty in reaching a unanimous verdict as to Count III. Absent additional instructions, the jury was left free to speculate as to the uses and/or the need for uniformity in reaching its ultimate conclusion. Given the particular juncture of the *Bay* trial, the Court's earlier "boiler plate" instruction as to the need for a unanimous verdict paled as the jury, unaided by additional instructions, sought to cope with the alternatives. The Government's insistence on breaking Count III apart led the trial court into error and deprived Bay of his right to a fair trial under the Sixth Amendment.

CONCLUSION

Larry E. Bay submits that the Writ of Certiorari should be granted and upon final determination of this cause, the conviction of the Petitioner in the United States District Court for the Eastern District of Pennsylvania should be reversed in that:

(a) The Third Circuit Court of Appeals' requirement that the defense of entrapment requires the admission of guilt of the crime charged and all of its elements, including the required mental state, violates the defendant's Fifth Amendment right by compelling him to incriminate himself before he can assert that the Government induced him to commit the offense;

(b) A split of authority exists between the Third, Sixth, Seventh and Tenth Circuits and the D.C. Circuit, the Second Circuit, the Fifth Circuit and Ninth Circuit, which permit a defendant to claim entrapment without admitting each of the essential elements of the substantive offense;

(c) This conflict is due to be resolved by the Supreme Court in a manner establishing a standard procedure and is presently the subject of a grant of *certiorari* in *United States v. Mathews*, which was argued on December 2, 1987, No. 86-6108;

(d) That the opinion of the Third Circuit regarding a violation of Larry Bay's Fifth and Sixth Amendment rights through the surreptitious interrogation conducted by a cooperating Government witness, after the United States had actual knowledge that the accused had asserted his Fifth and Sixth Amendment rights, must be decided in light of the Supreme Court's holding in *Arizona v. Mauro, supra*, and *Maine v. Moulton, supra;*

(e) That the opinion of the Third Circuit, which indicates that *Miranda* has indeed displaced *Escobedo* for Sixth Amendment purposes, involves an important question of Federal law which needs to be addressed and settled by the Supreme Court. The facts of this case present difficult questions regarding the relationship between the Fifth and Sixth Amendments as it impacts upon the untouched, vast range of police conduct which does constitute a cognizable violation of the right to effective assistance of counsel as well as Bay's continuing right to remain silent;

(f) That the Supreme Court should decide the important Federal question of whether special verdict forms are ever permissble, over objection, to be utilized in a criminal case.

For the reasons set forth hereinabove, Petitioner respectfully requests this Court to grant his Petition for Writ of Certiorari in order that the issues may be fully briefed and decision in favor of Petitioner ultimately reached.

RESPECTFULLY SUBMITTED,

David B. Byrne, Jr.

Attorney for Petitioner
P.O. Drawer 1470
Montgomery, Alabama 36102

DATED: February 23rd, 1988

CERTIFICATE OF SERVICE

I, David B. Byrne, Jr., a member of the bar of the Supreme Court of the United States and counsel of record for Larry E. Bay, Petitioner herein, hereby certify that on February 23rd, 1988, pursuant to Rule 28, Rules of the Supreme Court, I served three copies of the foregoing Petition for Writ of Certiorari on each of the parties herein, as follows: On the Solicitor General, Department of Justice, Washington, D.C. 20530, by depositing such copies in the United States Post Office, Montgomery, Alabama, first class postage prepaid, properly addressed to the post office address of the Solicitor General, Washington, D.C. 20530.

On the Honorable Bucky P. Mansuy, Assistant United States Attorney for the Eastern District of Pennsylvania, 3310 United States Courthouse, 601 Market Street, Philadelphia, Pennsylvania 19106, by depositing such copies in the United States Post Office, Montgomery, Alabama, first class postage prepaid, properly addressed, to the post office address of the United States Attorney, and the above-named counsel of record, at the United States Courthouse, Philadelphia, Pennsylvania 19106.

All parties required to be served have been served.

DATED the 23rd day of February, 1988.

David B. Byrne, Jr.
P.O. Drawer 1470
Montgomery, Alabama 36102

APPENDIX A

THIRD CIRCUIT OPINION, JUDGMENT, AND ORDER STAYING THE ISSUANCE OF THE MANDATE

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-1439

UNITED STATES OF AMERICA

v.

BAY, LARRY E.

Appellant

Appeal From the United States District Court
For the Eastern District of Pennsylvania
D.C. Criminal No. 87-00105-01
District Judge - Honorable Thomas N. O'Neill, Jr.

Argued December 7, 1987

Before: BECKER, GREENBERG, and HUNTER, *Circuit Judges*

Opinion filed December 30, 1987

MEMORANDUM OPINION OF THE COURT

HUNTER, *Circuit Judge:*

1. Appellant Larry E. Bay seeks a reversal of his conviction of two counts of obstruction of justice, 18 U.S.C. § 1503. He raises several claims on appeal, including a denial of his Fifth and Sixth Amendment rights, a duplicitous indictment and an impermissible amendment of the indictment by the trial court, complaints about rulings on evidence, an improper limitation of the entrapment defense, and the sufficiency of the evidence supporting a conviction. Having reviewed each of Bay's claims, this court will affirm his conviction.

BACKGROUND

2. This case arises out of a grand jury investigation of corruption among government contractors. In late 1985, the Defense Personnel Support Center ("DPSC") solicited bids on a trouser contract. One of the bids came from Coastal Industries, of Selma, Alabama ("Coastal"), with which Larry Bay was affiliated. Another bid was submitted by T.H. Apparels, Inc., of Gardena, California ("T.H. Apparels"). The grand jury, empaneled and sitting in the Eastern District of Pennsylvania, was investigating charges that during the first half of 1986, Coastal had arranged a $22,000 payment to T.H. Apparels in order to get them to withdraw their low bid. This arrangement seems to have involved as an intermediary B.G. Colton, an officer of H. Landau and Co., of Bala Cynwyd, Pennsylvania. Apparently, Colton sent to Coastal a false invoice for a non-existent shipment of cloth. In return, Coastal sent Colton a check made out to the fictitious "B.G. Mills," which Colton deposited in his personal bank account. Over several months, Colton then distributed most of that money to representatives of T.H. Apparel, and kept part of it for himself. Coastal was eventually awarded a portion of the contract, receiving total payments of over $2.5 million.

3. Larry Bay became involved in the investigation in April, 1986, when he was contacted by FBI agents. The agents informed Bay of their identity, the nature of their investigation, and warned him of his *Miranda* rights. Bay refused to answer questions and informed the

agents that he was represented by counsel. On October 24, 1986, Bay was served with a subpoena ordering him to appear before the grand jury on November 4, 1986. Prior to his appearance, Bay and his lawyer met with representatives of the U.S. Attorney, and Bay's attorney stated that Bay intended to refuse to answer questions. On November 4, 1986, Bay appeared before the grand jury, with his attorney outside the room. Bay was advised that he was a "subject" but not a "target" of the grand jury investigation, and advised of his rights. Bay then invoked his Fifth Amendment right to refuse answering questions.

4. Continuing its investigation, the grand jury subpoenaed Coastal on January 5, 1987, requiring the production of, *inter alia*, records of transactions with H. Landau and Co. and with B.G. Mills. Unknown to Bay, by that time Emanuel Landau ("Manny"), the president of H. Landau and Co., had agreed to cooperate with the government in its investigation; both he and his company later entered guilty pleas in charges related to the corruption at the DPSC. Not knowing of Manny's cooperation with the government, on January 7, 1987, Bay's wife called Manny and asked him to call Bay in about an hour, and to use a "clean" phone.

5. After speaking with Bay's wife, Manny called his attorney and the FBI, and was advised to call Bay and tape record the conversation. Manny did so, and turned the tape over to the FBI. He was then instructed to make further taped phone calls to Bay on January 8 and 19, in an effort to draw more information out of Bay. During these conversations, Bay seems to have been attempting to get Manny's aid in having Colton cover up the scheme to pay off T.H. Apparel; the plan was to have Colton ship goods to Coastal which would match the description on the invoice sent the previous year. The three recorded conversations formed the basis for the three counts in Bay's indictment.

6. Each of the three counts in the indictment returned on March 3, 1987, charged Bay with violating both 18 U.S.C. § 1503 (obstruction of justice) and 18 U.S.C. § 2(a) (aiding and abetting). The aiding and abetting charges were dropped when, after it had presented its evidence, the Government was allowed over objection to submit a redacted indictment. Paragraphs 6-8 of Count I, which were incorporated by reference

into the other counts, included a description of the underlying corruption investigation and of Bay's alleged role therein. Bay moved to dismiss the indictment on grounds of duplicity, to strike surplusage from the indictment, and further moved to suppress the recordings of his conversations with Manny. These motions were denied, the first two on May 4, 1987, and the third - - following a suppression hearing - - on May 11, 1987. On May 15, 1987, Bay filed a motion in limine to preclude the government from proving the allegations contained in paragraphs 6-8 of the indictment. This motion was similar to the earlier motion to strike surplusage, and was denied from the bench before the start of trial on May 18, 1987.

7. At trial, Bay objected to several proffers of evidence by the Government which related to the underlying corruption investigation. Specifically, Bay contended that evidence of the bid-rigging and bribery scheme which the grand jury was investigating could not be admitted as character evidence. The court overruled the objections. Later in the trial, the court again ruled against Bay, when Bay sought to testify that he had never been convicted of a crime.

8. Following the trial, the court charged the jury on May 21, 1987. The charge did not include an instruction on entrapment which Bay had requested, because Bay would not admit to every element of the offense, which the court required as a condition for the instruction.

9. The following day, the jury sent the court a note which read, in relevant part:

> Regarding Count 3 of the indictment, two statements are made. The first accuses the defendant of telling a representative of H. Landau that a Coastal officer would give a false explanation of the $22,000 payment. It then accuses the defendant of requesting Colton to also give a false explanation. In order to find the defendant guilty or not guilty, must each of these accusations be considered to be both true or both false?

The court responded, over Bay's objection, by submitting special findings to the jury which asked the jury to find Bay guilty or not guilty as to each of the two statements. The jury then returned a verdict of not guilty on Count I (based on the January 7 conversation), guilty on Count II (the January 8 conversation), and guilty as to the first statement of Count III (the January 19 conversation) but not guilty as to the second statement.

10. On July 20, 1987, the District Court denied Bay's motion for judgment of acquittal n.o.v. and entered a judgment of conviction. On the same day, the court sentenced Bay to pay a fine of $10,000 and a special assessment of $100, and to serve five years' probation, including six months in a half-way house and 300 hours of community service. Bay filed a timely notice of appeal on July 28, 1987.

DISCUSSION

I. *Suppression of the Tape Recordings.*

11. The suppression of the tape recordings raises two constitutional issues. The first issue is whether the Government's use of Manny's services impermissibly circumvented Bay's assertion of his Sixth Amendment right to counsel. The second issue is whether, assuming that the right to counsel had not yet attached at the time of the recorded conversations, there was an independent violation of Bay's Fifth Amendment right against self-incrimination. We conclude that Bay cannot show a constitutional violation under either theory.

A. *Had the Sixth Amendment Right to Counsel Attached?*

12. The prevailing standard of when the right to counsel attaches is found in *Moore vs. Illinois*, 434 U.S. 220 (1977). The Supreme Court, adopting the standard used by an earlier plurality in *Kirby vs. Illinois* 406 U.S. 682 (1972), announced:

> [T]he right to counsel attaches . . . "at or after the initiation of adversary judicial criminal proceedings -- whether by way of formal charge, prelimi-

> nary hearing, indictment, information, or arraignment." This is so because the initiation of such proceedings "marks the commencement of 'criminal prosecutions' to which alone the explicit guarantees of the Sixth Amendment are applicable."

434 U.S. at 226-27 (citations omitted).

13. While the rule announced in *Moore* could be read as applying only in the context of "corporeal identifications," *see id.* at 226, this court has clearly accepted *Moore* as a general statement about when the right to counsel attaches in all cases. *See, e.g., United States v. Muzychka*, 725 F.2d 1061, 1064 & n.4 (3d Cir.) *cert. denied*, 467 U.S. 1206 (1984). The question thus becomes whether Bay had ever been subjected to an adversarial judicial criminal proceeding and invoked his right to counsel prior to January, 1987, when the recordings were made.

14. Bay cites four separate events as having triggered his right to counsel. The first is the call from FBI Agents on April 14, 1986, when Bay told the agents he would not answer questions in the absence of an attorney. The second event Bay cites is actually two separate occurrences: the serving of the grand jury subpoena upon Bay on October 24, 1986, and the subsequent meeting between Bay (accompanied by counsel) and representatives of the U.S. Attorney. At the latter meeting Bay announced that he would not cooperate with the government and that he planned to invoke his Fifth Amendment rights before the grand jury. Bay testified at the suppression hearing that he was told at this meeting: either become a [cooperating] witness or we'll find a way to indict you." Appendix at 82. The third cited event is Bay's appearance before the grand jury on November 4, 1986, where he refused to answer questions. Finally, Bay says that his right to counsel was triggered on December 18, 1986, when the FBI interviewed B.G. Colton and, according to Bay's brief, obtained "probable cause" to suspect that Bay had committed a crime.

15. The first and last of these events clearly do not serve to trigger the Sixth Amendment right to counsel. An interview with inves-

tigative agents can in no way be construed as adversary judicial proceedings. Moreover, even if the interview with Colton did serve to transform Bay from a "suspect" into the "accused," the Supreme Court has stated that the right to counsel need not attach at the exact time at which probable cause is later found to have existed: "The police are not required to guess at their peril the precise moment at which they have probable cause to arrest a suspect, risking a violation of the Fourth Amendment if they act too soon, and a violation of the Sixth Amendment if they wait too long." *Hoffa v. United States*, 385 U.S. 293, 310 (1966).

16. Nor does Bay's appearance before the grand jury serve to attach the right to counsel. A number of Courts of Appeals, not including this one, have explicitly held that there is no Sixth Amendment right to counsel for grand jury testimony. *See, e.g., United States v. Ramsey*, 785 F. 2d 184 (7th Cir.), *cert. denied, sub nom. McCreary v. United States*, 106 S. Ct. 2924 (1986); *United States v. Vasquez*, 675 F.2d 16 (2d Cir. 1982). We see no reason to deviate from this course. Since a grand jury hearing is almost by definition an inquiry rather than adversary proceeding, it would not make sense to hold that Bay's appearance before the grand jury triggered his rights under the Sixth Amendment.

17. Finally, the meeting between Bay and the federal prosecutors was obviously not a judicial proceeding of any kind, and therefore did not trigger the right to counsel as interpreted by this court in *Muzychka*. However, this event may be troublesome in that -- if Bay's testimony is to be believed -- one of the Assistant U.S. Attorneys present at the meeting told Bay that they would find a way to indict him if he did not cooperate. Bay contends that this triggered his right to counsel because, regardless of the state of the judicial proceedings against him, the FBI's concern with him had become accusatory rather than investigative.

18. Bay tries to argue that the reasoning of *Escobedo v. Illinois*, 378 U.S. 478 (1964), which allows the right to attach before an accusatory pleading where the defendant has become the "focus" of the investigation, survived the Supreme Court's later decision in *Miranda v. Arizona*, 384 U.S. 436 (1966). However, as Judge Gibbons pointed out

in the *Muzychka* opinion, even if *Escobedo* does survive *Miranda*, it is a narrow holding which cannot serve to attach the right of counsel to the situation where a recording is made before the defendant's arrest or indictment, even if the Government's concern with the defendant had already reached the accusatory stage. *See Muzychka*, 725 F. 2d at 1066-67. Moreover, while some of the Courts of Appeal have resuscitated the "focus" reasoning of *Escobedo* in recent decisions, as noted in Bay's brief, they have not done so in the context of deciding to exclude evidence. *See DeAngelo v. Wainwright*, 781 F.2d 1516 (11th Cir.), *cert. denied*, 107 S. Ct. 444 (1986); *Flittie v. Solem*, 775 F.2d 933 (8th Cir. 1985), *cert. denied*, 106 S. Ct. 1223 (1986); *United States ex rel. Hall v. Lane*, 804 F.2d 79 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 1382 (1987). Finally, the *Muzychka* opinion indicates that *Miranda* has indeed displaced *Escobedo*. *Muzychka*, 725 F.2d at 1067-68.

19. Overall, the law of this circuit makes Bay's Sixth Amendment claim untenable. In addition to the law discussed above, the Government has cited a case that is fairly close to this one, although not perfectly analogous, in which this court held that the right to counsel had not attached. *See United States v. Mitlo*, 714 F.2d 294 (3d Cir.), *cert. denied*, 464 U.S. 1018 (1983). In *Mitlo*, a suspect who refused to talk to government agents was not able to suppress three tape recorded conversations he had with a person who turned out to be a cooperating witness. *Id.* at 295. This court held that since Mitlo had not been charged or arrested at the time of his conversation the Sixth Amendment right to counsel had not yet attached. *Id.* at 297. It is worth noting, however, that Mitlo was not charged or indicted until two years after the recorded conversations took place, whereas Bay was indicted less than two months after his conversations with Manny. Thus, while the investigation of Mitlo clearly had not entered the accusatory stage at the time of his conversations, the same is not obviously true in Bay's case. While this difference may be disturbing, it does not make Bay's claim any stronger under the law of this circuit.

B. Was There An Independent Fifth Amendment Violation?

20. Bay also asserts an independent violation of his right against self-incrimination, on a theory that the Government's orchestration of

Manny's phone calls constituted "coercion by subterfuge." *See* Appellant's Brief at 20-23. While Bay is correct in characterizing the conversations as interrogation within the meaning of *Rhode Island v. Innis*, 446 U.S. 291 (1980), his claim is completely meritless because he was not in police custody at the time of the conversations.

21. Judge Gibbons, in his *Muzychka* opinion, presented a detailed account of the current relationship between claims under the Fifth and Sixth Amendments. In describing how the decision in *Miranda* "displaced" much of the reasoning of *Escobedo*, Judge Gibbons wrote that in *Miranda*:

> [t]he privilege against self-incrimination was identified as primarily, if not solely, a fifth amendment problem, and fifth amendment interests were protected by imposing the requirement of a pre-interrogation ritualistic and largely ineffective warning. Even the warning requirement was applied only to custodial interrogation.

Muzychka, 725 F. 2d at 1067 (footnote omitted). Despite Judge Gibbons' obvious doubts about the effectiveness of *Miranda* warnings to protect the interest against self-incrimination in all cases, he did recognize that it is all the protection the law affords. Where, as here, a defendant is interrogated outside of police custody, there can be no claim of coerced self-incrimination.

II. *Duplicity*.

22. Bay next asserts that the indictment in this case was duplicitous. His main complaint on this score is the inclusion of paragraphs 6-8 of the indictment, which was incorporated into each of the three counts against him.

23. An indictment is duplicitous if it charges two or more distinct offenses in the same count. Such an indictment makes it possible for a jury to convict a defendant without being unanimous as to the offense actually committed, deprives the defendant of notice of the

charges against him, and possibly exposes a defendant to double jeopardy. *See United States v. Starks*, 515 F. 2d 112, 116-17 (3d Cir. 1975); *see also United States v. Aguilar*, 756 F. 2d 1418, 1420 n. 2 (9th Cir. 1985); 1 Wright *Federal Practice and Procedure*, Crim. 2d ¶ 142 (1982).

24. Paragraphs 6-8 of the indictment describe the scheme by which Coastal allegedly bribed T.H. Apparel to withdraw its bid for the DPSC trouser contract. The indictment does not characterize these alleged acts as unlawful, nor does it charge Bay with any offense other than the obstruction of justice. The Government correctly notes in its brief that without some such description of the underlying grand jury investigation, the charges against Bay would be incomprehensible.[1] Moreover, the District Court repeatedly and clearly charged the jury that they were to decide only whether Bay had violated the obstruction of justice statute and that they were not to consider whether there was any underlying criminality in the alleged bribery. *See* Supp. App. at 97-116.

25. Bay made several motions in the District Court alleging duplicity in the indictment, and each was correctly denied. The District Court's careful instructions to the jury further assured that the problems associated with duplicity would not infect this case. We therefore hold that the indictment was not duplicitous.

III. *Amending the Indictment.*

A. *Redacting the Aiding and Abetting Charges.*

26. Bay claims that the indictment against him was impermissibly amended when the Government was allowed over objection to submit a redacted indictment which omitted all mention of charges under the aiding and abetting statute, 18 U.S.C. § 2. This claim is without merit. In *United States v. Bryant*, 483 F. 2d 88 (3d Cir. 1973), this court wrote that an aiding and abetting charge "is an alternative charge in

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1. Indeed, Bay's brief to this court is similarly incomprehensible without reference to the background paragraphs of the indictment for an explanation of what Bay was allegedly trying to cover up.

every count, whether explicit or implicit." *Id.* at 95 (quoting *United States v. Bullock*, 451 F. 2d 884, 888 (5th Cir. 1971)). The *Bryant* opinion went on to note that a conviction may be sustained where the indictment does not specify whether the defendant is charged as an aider and abettor or as a principal. *Id.* (citing as *United States v. Provenzano*, 334 F. 2d 678 (3d Cir.), *cert. denied*, 379 U.S. 947 (1964)). Since the grand jury need not have decided whether to charge Bay as an aider and abettor or as a principal, Bay cannot have been prejudiced by the fact that the Government abandoned the aiding and abetting theory at trial. The redacted indictment thus does not constitute an amended indictment and is no basis for reversal.

B. *Submitting Special Findings on Count III.*

27. Bay also claims that the indictment was amended when the District Court submitted special findings to the jury in response to their question about Count III. By asking the jury to find guilt or innocence as to each of the two statements conjunctively alleged in the indictment, Bay asserts, the District Court constructively added a fourth count. This would constitute an impermissible broadening of the indictment. *See Stirone v. United States*, 361 U.S. 212 (1960); *Ex Parte Bain*, 121 U.S. 1 (1877). Because this argument ignores some fairly clear case law to the contrary, we will not grant Bay's request for a new trial.

28. There are actually two related issues here: the propriety of using special findings in a criminal case, and the possible broadening of an indictment contrary to the grand jury clause of the Fifth Amendment. As to the latter, the case law is rather clear that where an indictment alleges several acts in the conjunctive, and the Government is only able to prove one of those acts at trial, there is no amending of the indictment and a conviction is constitutional. In *United States v. Miller*, 471 U.S. 130 (1985), the indictment charged that the defendant had both staged a burglary and filed an inflated insurance claim. At trial, the Government only proved the second of the two acts. In affirming the conviction, the Supreme Court noted that even if an indictment pleads in the conjunctive, guilt can be proved as to only one of the alleged acts. *Id.* at 136 (citing *Crain v. United States*, 162 U.S. 625, 634-36 (1896); *Dealy v. United States*, 152 U.S. 539, 542 (1894)). As the Court wrote, "[t]he

variance complained of added nothing new to the indictment and constituted no broadening." *Id.* at 145. *See also Turner v. United States*, 396 U.S. 398, 420 (1970); *Government of Virgin Islands v. Derricks*, 810 F. 2d 50, 55 n. 3 (3d Cir. 1987).

29. Given that a jury could constitutionally convict Bay of Count III based solely on proof as to one of the two alleged statements, the remaining issue is whether the way in which they did so was permissible. Specifically, we must determine whether the District Court properly submitted special findings to the jury asking for a verdict as to each of the two statements in Count III. Bay's sole argument as to this specific issue is founded on the dissent in *United States v. Desmond*, 670 F. 2d 414, 420-21 (3d Cir. 1982) (Aldisert, J., dissenting). While the majority of the panel in *Desmond* noted its general disapproval of the use of special verdicts in criminal cases but refused to announce a general prohibition of them, the dissent stated that the District Courts had had plenty of time to learn this court's feelings on the subject, and that the time had come to exercise supervisory powers and announce a general prohibition. *See id.*

30. Bay's argument, of course, is based on a view which did not prevail when this court decided the *Desmond* case. The law of this circuit is that special verdicts may be used in some cases. Where, as here, there is no reason to believe that the use of special verdicts led the jury step by step to a verdict of guilty, *see United States v. Palmeri*, 630 F. 2d 192, 202-03 (3d Cir. 1980), *cert. denied*, 450 U.S. 967 (1981), and there is no reason to doubt the unanimity of the jury as to each of its findings, a new trial is not required as a matter of law.

IV. *Restricting the Entrapment Defense*

31. The District Court refused to instruct the jury on the defense of entrapment because Bay would not admit to all of the elements of the charged offense. While Bay admitted to all of the acts alleged in the indictment, he denied the mens rea element. The court correctly noted that it had no choice but to follow the precedent set by this court. *See* Appendix at 133-34; *United States v. Janotti*, 673 F. 2d 578, 601 (3d Cir.) (in banc) (quoting *United States v. Hill*, 655 F. 2d 512, 514 (3d Cir.

1981)), *cert. denied*, 457 U.S. 1106 (1982). Since it is the practice of this court to avoid intra-circuit splits by not having one panel overrule an earlier published decision, Bay can obtain no relief from this court on this issue. *See* Internal Operating Procedures, Chapter 8, § C.

32. Moreover, as Bay notes in his brief, the Supreme Court has granted certiorari in a case presenting this precise issue. *United States v. Matthews*, 803 F. 2d 325 (7th Cir. 1986), *cert. granted*, No. 86-6109, 107 S. Ct. 1601 (1987). The sole question presented in *Matthews*, which was argued on December 2, is whether a defendant may be required to admit all the elements of a crime, including mens rea, before being allowed to present an entrapment defense. 56 U.S.L.W. 3034 (1987). Since the question is about to be decided by the Supreme Court, there is no need for this court to reconsider the rule of *Hill* now.

V. *Evidence Relating to the Bribery Scheme.*

33. Bay's next claim is that the District Court improperly allowed the admission of evidence on three separate occasions. This court reviews such claims under an abuse of discretion standard. *In re Japanese Electronic Products*, 723 F. 2d 238, 260 (3d Cir. 1983), *rev'd on other grounds sub nom. Matsushita Electric Indust. Co., Ltd. v. Zenith Radio Corp.*, 106 S. Ct. 1348 (1986).

34. Bay's claim is that the court improperly admitted evidence of (1) a $22,000 payment by Coastal to T.H. Apparel made through B.G. Colton; (2) strikingly similar bids submitted by Coastal and another company bidding for the same government contract; and (3) a $50,000 payment by one James Utsey and Manny to a third individual. Excerpts from the trial transcript showing the admission of each are printed in the Appendix at 143-54.

35. Bay's theory as to these claims is not quite clear. In his opening brief his theory seems to be that the court did not go through the balancing process required under Fed.R.Evid. 404 (b) in deciding whether to admit the evidence. Appellant's Brief at 37-41. But in the reply brief, Bay seems to frame the issue in terms of the adequacy of the court's jury charge; his claim seems to be that the evidence may have

been properly admitted for a limited purpose, but that that purpose was not made clear to the jury during the court's instructions. Reply Brief at 8-13.

36. Under a theory of improper admission of evidence, Bay cites no controlling law to support his claim. Moreover, as the Government correctly points out, the three pieces of evidence to which Bay objects do not involve Bay himself. As such, they are not subject to Rule 404 (b), which allows the introduction of a defendant's other bad acts for certain limited purposes. Finally, as the trial transcripts show, the District Court clearly understood that each piece of evidence was offered for a limited purpose and not as character evidence with which Bay was supposed to have acted in conformity. There is thus no reason to find that the court abused its discretion in admitting any of the challenged evidence.

37. The idea that the court denied Bay a fair trial by not adequately instructing the jury as to the purpose of the evidence is likewise meritless. As discussed above, the court's charge clearly instructed the jury as to the limited nature of the charges against Bay, and explicitly stated that the underlying bribery scheme was not at issue. Taken as a whole, the instructions cannot be seen to have prejudiced Bay.

VI. *Refusal to Admit Bay's Character Evidence.*

38. The second claim regarding evidentiary rulings at trial challenges the District Court's refusal to allow Bay to testify that he had never been convicted of any offense. *See* Appendix at 156-59. As with the preceding issue, the standard of review is abuse of discretion. *In re Japanese Electronic Products, supra.*

39. In *Government of Virgin Islands v. Grant*, 775 F.2d 508, 512 (3d Cir. 1985), this court held "that testimony as to an absence of prior arrests does not, standing alone, constitute evidence of good character admissible as such under Rule 405(a)." As to the characterization of such testimony as "background" evidence, the court noted that the law is to a great extent unsettled in this area, and that a trial judge must be accorded

wide discretion in its rulings. *Id.* at 513. Thus, regardless of the wisdom of barring such testimony, the District Court's decision should not be held an abuse of discretion.

VII. *Sufficiency of the Evidence.*

40. The final issue in Bay's brief is presented as a challenge to the sufficiency of the evidence supporting his conviction. Normally, appellate review of such a claim is limited to the question of whether, taking the view most favorable to the government, there is substantial evidence to support a guilty verdict. *Glasser v. United States*, 315 U.S. 60, 80 (1942); *United States v. Smith*, 789 F.2d 196, 206 (3d Cir.), *cert. denied*, 107 S. Ct. 668 (1986). In this case, however, Bay does not really challenge the persuasive value of the evidence;[2] Instead, his brief asserts that the evidence does not show a violation of the statute under which he is charged. Our review of this type of legal question is plenary. *See Chrysler Credit Corp. v. First Nat. Bank*, 746 F.2d 200, 202 (3d Cir. 1984); *Universal Minerals, Inc. v. C.A. Hughes & Co.*, 669 F.2d 98, 101-02 (3d Cir. 1981).

41. Bay raises three arguments on this point. His main theory is that an endeavor to influence the testimony of people who are merely potential witnesses (i.e., those who have not yet been subpoenaed) is not prohibited by 18 U.S.C. § 1503, both because potential witnesses are not protected at all, and because witnesses are only protected under 18 U.S.C. § 1512. The second theory is that the mere rendering of false testimony, by itself, does not support a conviction for obstruction of justice. Finally, Bay argues that because his acts did not -- and could not -- result in the production of false or misleading testimony to the grand jury, he cannot be convicted. Each of these theories is discussed in turn below.

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[2] Bay does make some brief and conclusory assertions that the evidence itself was insufficient and that the Government has not proven specific intent, but he makes no supporting argument. Under the applicable substantial evidence test, Bay's position is untenable. Viewing the evidence most favorably to the Government shows more than a substantial amount of evidence supporting a conviction. To the extent that Bay challenges the evidence itself, then, the conviction will be affirmed.

A. *The Scope of § 1503.*

42. The parties are in agreement that the portion of § 1503 under which Bay was convicted was the omnibus clause at the end of the section. This clause reads:

> Whoever corruptly ... endeavors to influence, obstruct, or impede the due administration of justice, shall be fined ... or imprisoned.

18 U.S.C. § 1503 (1982).

43. Bay's argument is premised on the assertion that § 1503 is designed to protect the *participants* in federal judicial proceedings. From this beginning, he builds an argument that since potential witnesses such as Manny Landau and B.G. Colton are not yet part of the judicial proceedings, they are not protected by § 1503, and hence Bay cannot be convicted for trying to influence their later testimony. While there are problems with the reasoning, the central problem in this argument is the premise. It is true that § 1503 protects participants in judicial proceedings, but the case law makes clear that the statute is also meant to protect the proceedings themselves against abuse. *See United States v. Shoup*, 608 F.2d 950, 962 (3d Cir. 1979); *United States v. Walasek*, 527 F.2d 676, 678-79 (3d Cir. 1975). Given that the statute attempts to protect the judicial process, any distinction between potential and actual witnesses seems irrelevant if the effect of endeavoring to influence their testimony could be to hamper the judicial proceedings at issue.

44. Even if Bay is correct to focus on the persons protected by § 1503, his distinction between actual (subpoenaed) and potential witnesses is meritless. The sole support offered for this distinction is a quote from *United States v. Brand*, 775 F.2d 1460, 1470 (11th Cir. 1985), a factually dissimilar case in which the Court of Appeals explicitly limited its holding to the specific facts before it. By contrast, the Government cites *United States V. Friedland*, 660 F.2d 919 (3d Cir. 1981), *cert. denied*, 456 U.S. 989 (1982), in which this court held that a defendant who solicits false testimony from someone he perceives may become a witness can be convicted under § 1503. *Id.* at 930-31 (quoting

United States v. Falk, 370 F.2d 472, 476 (9th Cir. 1966), *cert. denied*, 387 U.S. 926 (1967)).[3] We therefore hold that Bay's attempt to influence the possible testimony of Manny Landau and B.G. Colton is within the range of acts prohibited by § 1503.

45. Bay further attempts to avoid the application of § 1503 by arguing that the acts he is charged with are prohibited by 18 U.S.C. § 1512, which specifically prohibits witness tampering, rather than by § 1503. His argument is based on the legislative history of the 1982 act which amended § 1503 and created § 1512. Bay correctly notes that the amendment deleted all references to "witnesses" from § 1503, and that Congress simultaneously created a statute protecting witnesses in § 1512. From this he concludes that Congress intended to eliminate the protection of witnesses under § 1503; since the indictment charges Bay with what amounts to witness tampering, the charge should be brought under the witness tampering statute rather than § 1503.

46. There is some limited support for Bay's statutory argument in *United States v. Hernandez*, 730 F.2d 895, 899 (2d Cir. 1984), in which the Court of Appeals for the Second Circuit wrote "Congress intended that intimidation and harassment of witnesses should thenceforth be prosecuted under § 1512 and no longer under § 1503." However, Bay is not accused of intimidating or harassing a witness; he was accused and convicted of acts which were meant to interfere with a grand jury investigation. There is no sense in which his conversations with Manny can be seen as harassing or intimidating; rather, they are Bay's strategy discussions with someone he saw as a colleague in his attempt to cover up the bid-rigging scheme. Moreover, at least two Courts of Appeals have questioned the applicability of *Hernandez* beyond a very narrow range of cases. *See Brand*, 775 F.2d at 1465 n.5 (11th Cir.); *United States v. Wesley*, 748 F.2d 962 (5th Cir. 1984), *cert. denied*, 471 U.S. 1130 (1985).

47. Finally, given Bay's position that § 1503 only protects

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[3] The court also noted that whether someone was a "witness" for purposes of § 1503 was "entirely irrelevant. Appellants were charged and convicted under the [omnibus] portion of § 1503 which, unlike other provisions of § 1503, does not include any reference to a 'witness.'" 660 F.2d at 930.

participants in the judicial process and not the process itself, his argument about the relationship between § 1503 and § 1512 cannot work because it would make the omnibus clause of § 1503 meaningless. Since all the participants in the judicial process are covered in the other portions of § 1503 or in § 1512, under Bay's theory there would be no persons left to be protected by the omnibus clause. If that clause does not protect any class of persons, and further does not protect the judicial process itself, then it is an empty provision. The rules of statutory construction forbid a reading of the omnibus clause of § 1503 which would render it meaningless. *See Vornado, Inc. v. Retail Store Employees' Union Local 126?*, 829 F.2d 416, 420 (3d Cir. 1987) (citing 2A *Sutherland's Statutory Construction* § 46.06 (4th ed. 1984)).

B. *Rendering False Testimony.*

48. Bay's second theory as to the sufficiency of the evidence is that the mere rendering of false testimony, by itself, cannot support a conviction for obstruction of justice. While his assertion is correct, it is also completely irrelevant to this case. The three cases Bay cites in support of this argument all discuss whether an obstruction of justice charge may be based on the defendant's perjury. *See In re Michael*, 326 U.S. 224 (1945); *Brand*, 775 F.2d at 1466-67; *United States v. Essex*, 407 F.2d 214 (6th Cir. 1969). By contrast, the Government has not alleged any perjury by Bay; the charges in this case stem from Bay's endeavors to alter the testimony of others before a grand jury. Bay's argument under this theory is thus without merit.

C. *Need the Endeavor to Obstruct Justice Succeed?*

49. The final prong of Bay's argument rests on an impossibility theory. He asserts that his conversations with Manny did not in fact obstruct justice in any way, and that they could not have done so because Manny had already agreed to cooperate with the Government. In support of this theory, Bay cites some non-controlling case law for the proposition that an act charged under § 1503 must at least be capable of producing an obstruction of justice. This argument is unpersuasive because the controlling law in this circuit is directly to the contrary. Specifically, the Supreme Court rejected an impossibility theory in §

1503 cases in *United States v. Osborn*, 385 U.S. 323 (1966). More recently, this court held that "one may *endeavor* to obstruct justice without actually succeeding in that endeavor." *United States v. Shoup*, 608 F.2d 950, 962-63 (3d Cir. 1979) (citing *Osborn*).

CONCLUSION

50. The District Court made no mistakes of law in handling this fairly complex case and its evidentiary rulings were not an abuse of discretion. We will therefore affirm Bay's conviction.

TO THE CLERK

Please file the foregoing opinion.

JAMES HUNTER, III, *Circuit Judge*

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-1439

UNITED STATES OF AMERICA

v.

BAY, LARRY E.

Appellant

Appeal From the United States District Court
For the Eastern District of Pennsylvania
D.C. Criminal No. 87-00105-01
District Judge - Honorable Thomas N. O'Neill, Jr.

Before: BECKER, GREENBERG, and HUNTER, *Circuit Judges*

JUDGMENT

This cause came to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued December 7, 1987.

On consideration whereof, it is now ordered and adjudged by this court that the order of the District Court entered July 20, 1987 be, and the same is hereby, affirmed

ATTEST:

Clerk

Dated: December 30, 1987

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-1439

UNITED STATES OF AMERICA

v.

BAY, LARRY E.,

Appellant

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until February 19, 1988.

Circuit Judge

Dated: JAN 25 1988